SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

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CARRIE L. SVENDAHL
CLERK OF COURT

COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT　　　　STATE OF MINNESOTA

Winifred Feezor and Cecelia M. St. Pierre, Plaintiffs,	)	
vs.	)	Court File No. 311-98
The Shakopee Mdewakanton Sioux (Dakota) Community Business Council; Stanley R. Crooks, Glynn Crooks, and Susan Totenhagen individually and in their official capacities; Stanley R. Crooks, Kenneth Anderson, and Darlene Matta, individually and in their former capacities as designated officers of the Shakopee Mdewakanton Sioux (Dakota) Community Business Council; and various unnamed individuals, Defendants.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

Plaintiffs filed this lawsuit on August 13, 1998, seeking injunctive and declaratory relief. The Plaintiffs allege that the unnamed defendants are not properly qualified members of the Community, and that the other defendants are responsible for improperly distributing the benefits of Community membership to them.

In order to understand the allegations made by the Plaintiffs, a short review of the law governing Community membership is necessary. "One of an Indian Tribe's most basic powers is

the authority to determine questions of its own membership," and "a tribe has power to grant, deny, revoke, and qualify membership." Smith et al. v. SMS(D)C Business Council et al., No. 038-94 (SMS(D)C Tr. Ct. July 8, 1994), aff'd, SMS(D)C Business Council et al. v. Smith et al., No. 001-94 (SMS(D)C Ct. App. June 19, 1995). The SMS(D)C Constitution and Enrollment Ordinance govern the standards and procedures for membership applications. Cermak, et al. v. Shakopee Mdewakanton Indians d/b/a Mystic Lake Casino and Dakota Country Casino, et al., 039-94 (SMS(D)C Tr. Ct. Apr. 11, 1995); see also Welch, et al. v. SMS(D)C, et al., No. 023-92 (SMS(D)C Tr. Ct. Dec. 23, 1994). In the SMS(D)C, the ultimate authority for membership determinations is vested with the Community's governing body, the General Council, not with this Court. Smith et al. v. SMS(D)C Business Council et al., No. 038-94 (SMS(D)C Tr. Ct. July 8, 1994), aff'd, SMS(D)C Business Council et al. v. Smith et al., No. 001-94 (SMS(D)C Ct. App. June 19, 1995). Unless something is out of the ordinary in the manner in which the General Council makes its determinations, this Court will refrain from interfering with membership determinations of the General Council and the enrollment process. Smith et al. v. SMS(D)C Business Council et al., No. 038-94 (SMS(D)C Tr. Ct. July 8, 1994, aff'd, SMS(D)C Business Council et al. v. Smith et al., No. 001-94 (SMS(D)C Ct. App. June 19, 1995)

Article II, Section 1 of the Community Constitution provides that membership in the Community shall consist of (a) persons of Shakopee Mdewakanton Sioux blood who were on the 1969 charter roll, (b) children of enrolled members who are at least ¼ degree Shakopee Mdewakanton Sioux Blood, or (c) descendants who are at least ¼ degree Shakopee Mdewakanton Sioux Blood and can trace their ancestry to the 1886 base roll. Section 2 of Article II grants the General Council "the power to pass resolutions or ordinances, subject to

approval of the Secretary of the Interior, governing future membership, adoptions, and loss of membership."

This Court has specifically held in the past that the General Council's historical practice of "voting in" or adopting new members by ordinance under Article II, Section 2, without requiring that hose persons demonstrate that they possess one-fourth Mdewakanton Sioux blood, is a reasonable and permissible interpretation of the Community's Constitution. Smith et al. v. SMS(D)C, No. 11-96 (SMS(D)C Ct. App. Aug. 7, 1997). Such ordinances are reviewed by the Secretary of the Interior under the terms of Article II, Section 2.

Plaintiff's Complaint in this action essentially challenges the validity of two adoption ordinances passed by the Community pursuant to Article II, Section 2. This is not the first time that these (or similar) Plaintiffs have brought these same (or similar) issues to the attention of this Court. In 1994, Plaintiffs filed a complaint alleging that 31 persons had been improperly admitted to membership under the terms of the 1993 Adoption Ordinance involved in this suit. Although this Court initially issued a limited injunction, Plaintiffs subsequently voluntarily dismissed the suit, and this Court then held that any preliminary orders in that case were vacated. Smith v. SMS(D)C Business Council, No. 038-94 (SMS(D)C Tr. Ct. June. 10, 1994), vacated (SMS(D)C Tr. Ct. June 30, 1995); see also Feezor v. SMS(D)C Business Council, et al., No. 311-98 (SMS(D)C Tr. Ct. Aug. 24, 1998).

In 1995, Plaintiffs filed another complaint alleging that per capita payments were being made to people who were not members, including persons adopted under the same 1993 Adoption Ordinance in this suit. This Court dismissed Plaintiff's complaint, Smith v. SMS(D)C Business Council, No. 060-95 (SMS(D)C Tr. Ct. Dec. 19, 1996), and the Court of Appeals aff'd. Smith v. SMS(D)C Business Council, No. 011-96 (SMS(D)C Ct. App. Aug. 7, 1997).

The validity of the 1993 Adoption Ordinance is also at issue in an action now pending in federal district court. See Feezor v. Babbitt, 953 F. Supp. 1 (D.D.C . 1996) ("Babbitt"). Babbitt began as a challenge under the Administrative Procedures Act ("APA") to the decision of the Interior Board of Indian Appeals ("IBIA") to approve this ordinance under the Community Constitution. See Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 163 (1995). In 1996 the federal district court held that gaps in the administrative record prevented the court from ruling on the issues raised in the case and remanded the case to the Department of the Interior for answers to three questions. Babbitt, 953 F. Supp. at 6. On February 2, 1999 Kevin Gover, Assistant Secretary - Indian Affairs, responded, and shortly thereafter, this court ordered the parties to submit briefs explaining the effect of the Assistant Secretary's action on this case. Order, SMS(D)C Tr. Ct., February 9, 1999. Both parties subsequently briefed this issue. After reviewing the briefs submitted in response to the February 19, 1999 order, this court ordered the parties to submit supplemental briefs on whether the BIA Area Director had acted on the 1993 Ordinance within the ten day period required by the SMS(D)C Constitution . In addition, the order invited Plaintiffs' response to the issues raised by the Third Affidavit of Susan Totenhagen. Finally, the order scheduled oral argument on Defendants' motion for summary judgment for May 5, 1999. Order, SMS(D)C Tr. Ct., March 31, 1999. Both parties filed supplemental briefs in response to this order, and oral arguments were heard by this court as scheduled.

It is in this context that the Court turns to the merits of the present dispute.

II. FACTUAL BACKGROUND

According to the submissions of the parties, the undisputed facts are as follows. On November 30, 1993, the Community passed an adoption ordinance, No. 11-30-93-002 ("the 1993 Ordinance"), that allowed individuals who would not necessarily qualify under Article II, Section 1 of the Constitution to become members of the Community if they were (1) lineal descendants of tribal members, (2) not members of another tribe, and (3) except for minor children, had a land assignment on the Reservation. The certification adopting the ordinance indicates that it was passed by a vote of 33 for, 32 against, 6 abstentions, and 1 spoiled ballot. On December 13, 1993, the Acting Minneapolis Area Director of the BIA disapproved the ordinance because it allowed individuals of less than 1/4 degree blood to become members, which in the Area Director's opinion was contrary to the Community Constitution. See Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, 27 IBIA 163, 168 (1995).

The Community appealed the Area Director's decision to the IBIA, which reversed the Area Director's decision to disapprove the adoption ordinance. The IBIA reasoned that the conflicting interpretations by the Community and the Area Director were both reasonable, and therefore the Bureau should adopt the Community's interpretation of its own Constitution out of deference to tribal self government. Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 163, 171 (1995).

As Noted above, some of the same Plaintiffs in this case then filed suit in federal district court challenging the IBIA's decision to approve the adoption ordinance. After concluding it could review the dispute, the district court remanded the case to the Department of the Interior for consideration of three issues; (1) whether the IBIA improperly exceeded the 90 day limit for

review of a decision by an Area Director, (2) whether the Community's appeal of the Area Director's decision was properly authorized, and (3) whether the adoption ordinance was validly enacted. See Babbitt, 953 F. Supp. at 6 (D.C. 1996).

While on remand, the Community passed another adoption ordinance, No. 5-13-97-02, ("the 1997 Ordinance"). The resolution adopting the 1997 Ordinance indicates it was passed by a vote of 47 for, none against, and no abstentions. This vote included the votes of 13 people who had become members by virtue of the 1993 Ordinance. Third Totenhagen Aff., ¶5. The voter sign-in sheet for the May 13, 1997 General Counsel meeting at which the 1997 Ordinance was adopted contained the names of 113 persons. Second Totenhagen Aff., Ex. 10. Forty-nine of these people, including 13 of the 27 persons who were adopted pursuant to the 1993 Ordinance, attended the meeting. Id.; Third Totenhagen Aff., ¶ 5. Two of the 49 did not vote. The Chairman was one of these, but, the balloting being secret, the identity of the other non-voter is unknown. Second Totenhagen Aff., Ex. 9.

On May 23, 1997, the Area Director then approved the 1997 Ordinance, reasoning that facially it was not materially different from the 1993 Ordinance currently in effect. After the approval of the 1997 Ordinance, the Community argued to the Department of Interior that the remand from the District Court on the 1993 Ordinance was moot. The May 22, 1998 memorandum from the Office of the Solicitor attached to Plaintiff's Complaint in this action addresses to the issue of mootness. The Solicitor concludes that the controversy was not mooted by the approval of the 1997 Ordinance, and that administrative briefing before the Department of Interior should be ordered on the validity of the ordinances. The Assistant Secretary concurred and, as noted above, issued his response to the remanded questions on February 2, 1999. As to

whether the IBIA could exceed the 90-day constitutional time limit for Secretarial review of tribal adoption ordinances, he concluded that this deadline "places a jurisdictional limitation on the authority of the Secretary to approve an ordinance initially disapproved by the Area Director...." In re Feezor v. Babbitt Remand of the Shakopee Mdewakanton Sioux (Dakota) Community Ordinance No. 11-30-93-002 (Second Adoption Ordinance) (United States Department of the Interior, Office of the Secretary, February 2, 1999) at 7 (the "Gover Decision").

Assistant Secretary Gover did not answer the second remanded issue, i.e., whether the Community's appeal to the IBIA was properly authorized by the General Council. This issue, he concluded, was moot "in light of the fact that the jurisdictional issue regarding the 90-day period for Secretarial review is dispositive with respect to determining the status of the Second [i.e., 1995] Adoption Ordinance", because his decision on that issue "affords the relief they [the Plaintiffs] sought in Babbitt, and, finally, because to address this question would be "unnecessarily deciding an issue of tribal law, contrary to the strong policy of avoiding unnecessary federal intrusion into tribal affairs." Id. at 12. As a result, he declined "to consider the second remanded issue further. Id.

Although he recognized that his decision on the 90-day issue, also made it "unnecessary to address" the question of whether the 1993 Ordinance was enacted by a proper majority of tribal " members, he nevertheless did so on the ground that the question is "one that is likely to recur", and, therefore, appropriate "in order to set forth a Departmental position and provide appropriate guidance to the BIA." Id. at 13. After a detailed discussion of the proper role of the BIA in acting pursuant to tribal law, the Assistant Secretary concluded that "as a general matter,

it is not appropriate for the Department to review internal tribal disputes concerning voter eligibility when exercising ordinance review or approval authority pursuant to tribal law." Id. at 14. In this case he found no reason to depart from this general rule because he found no "'distinct federal interest' that requires the examination of voter eligibility in deciding whether or not to approve an election ordinance." Id. at 16.

While the remand to Interior was pending, Plaintiffs filed this action in the SMS(D)C Trial Court seeking injunctive relief and damages. Essentially, Plaintiffs ask this Court to suspend the per capita payments and voting rights of people who have been adopted into the Community, including those adopted under the 1993 and 1997 ordinances, until the validity of those ordinances is settled in the federal courts. The Amended Complaint also describes Plaintiffs' desire for a quick resolution to these issues. The balance of the Complaint requests (1) an order declaring that the defendants have distributed per capita payments in violation of the Business Proceeds Distribution Ordinance, and (2) damages for past per capita payments distributed in violation of the Business Proceeds Distribution Ordinance. All of the Plaintiff's claims, however, turn on the validity of the 1993 and 1997 ordinances, and upon the ability of the Community to adopt members under Art. II, Sec. 2.

Plaintiffs filed a Motion for a Temporary Restraining Order and Preliminary Injunctive Relief on the same day they filed their complaint. After a hearing, this Court denied Plaintiff's motions on August 24, 1998. The Plaintiffs had filed no affidavits to support their request for preliminary relief, and this Court concluded that upsetting the present status quo without any factual showing of wrongdoing would be inappropriate. Feezor v. SMS(D)C Business Council, et al., No. 311-98 (SMS(D)C Tr. Ct. Aug. 24, 1998).

Defendants then filed an answer and counterclaims to Plaintiff's Complaint on August 31, 1998. The counterclaims generally seek a declaration concerning whether persons adopted into the Community are in fact members of the Community entitled to the full benefits of membership.

On November 11, 1998, Defendants moved for summary judgment on its counterclaims. Pursuant to SMS(D)C Rule 33, a hearing was scheduled for December 9, 1998.

On November 20, 1998, Plaintiff filed a Motion for a Stay of the Proceedings, or in the Alternative for a Continuance. This Court granted Plaintiffs' motion for a continuance, and rescheduled the hearing date for December 14, 1998.

In their response to Defendants' Motion for Summary Judgment, Plaintiffs attached pleadings from the proceedings before the United States Department of the Interior. Defendants responded and also included their pleadings from the same proceedings.

At the summary judgment hearing, Plaintiff presented new documents to the Court to include in the record, despite the fact that Rule 33 requires that responsive documents be filed at least nine days before the summary judgment hearing. In an unsolicited letter sent to this Court on January 15, 1999 (over a month after the summary judgment hearing), Plaintiffs' attorney explained he did not include these documents in his responsive pleading because he had been out of town and did not have time to adequately prepare a response to the Defendants' Summary Judgment Motion. The Court finds this explanation puzzling since Plaintiffs initiated this action and asked for expedited consideration, the summary judgment motion was noticed and scheduled in accordance with Rule 33, and this Court had already granted Plaintiff one continuance. Against the Court's better judgment, however, it will take notice of the documents presented at

the hearing and include them in the record. The Court has carefully reviewed all of the filed materials in reaching its decision below.

III. LEGAL DISCUSSION

A. Standard of Review

The Defendant's Motion for Summary Judgment on its counterclaims is now before the Court. Rule 28 of the SMS(D)C Rules of Civil Procedure requires that summary judgment only be entered for the moving party if there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Welch v. SMS(D)C, No. 036-94 (SMS(D)C Tr. Ct. Nov. 27, 1995). When considering a motion for summary judgment, it is the duty of the court to view the factual evidence in the light most favorable to the non-moving party and to give that party the benefit of all reasonable inferences drawn from the factual evidence. Barrientez v. SMS(D)C, No. 007-88 (SMS(D)C Tr. Ct. Sept. 7, 1990).

B. The Feezor Affidavit

In order to determine if a genuine issue of material fact exists, this court must first be clear about what constitutes the record. Prior to the summary judgment hearing, Defendants moved to strike an affidavit by Winifred Feezor presented by the Plaintiffs in their response to the summary judgment motion. Defendants objected to the affidavit on the basis that it did not conform to the requirement of SMS(D)C Rule of Civil Procedure 28, which incorporates Fed. R. Civ. Pro. 65. Rule 28 requires that affidavits supporting motions for summary judgment be made on personal knowledge, set forth facts that would be admissible at trial, and show that the affiant was competent to testify on the matters stated therein.

After carefully reviewing Ms. Feezor's affidavit, and construing it in a light most favorable to Plaintiffs, the Court is unable to conclude that the Feezor affidavit is based on personal knowledge or presents facts that would be admissible at trial. Ms. Feezor's affidavit attests to her "general sense and fear" that the 1993 ordinance was not properly passed by the Community's General Council, and to her speculation regarding what various markings on the voter sign-in sheet may mean. See Feezor Aff. at ¶ 18. However, Ms. Feezor admits that she has no personal knowledge of what the markings mean, and that she was not present when the votes were counted. Feezor Aff., ¶¶10 and 18. Ms. Feezor notes that the reported tally on the 1993 Ordinance "always seemed a bit fishy to me," but besides citing her "sense" that the ordinance did not pass, she fails to specify factual allegations based on personal knowledge that would support her conclusion. Ms. Feezor's beliefs, senses, and speculation about whether the 1993 Ordinance was properly adopted by the Community fail to meet the standards of SMS(D)C Rule 28, and cannot, by definition, be used to create a genuine issue of material fact. See, e.g., Marler v. Missouri St. Bd. of Optometry, 102 F.3d 1453, 1457 (8th Cir. 1996).

C. The Third Totenhagen Affidavit

In support of its contention that the 1997 Ordinance was properly enacted, Defendant filed an affidavit of Susan Totenhagen dated March 8, 1999 (the "Third Totenhagen Affidavit"). This affidavit and its supporting Exhibits purport to supplement and correct certain aspects of the affiant's second affidavit dated November 10, 1999 (the "Second Totenhagen Affidavit"). As described above[1], the Third Totenhagen Affidavit says that although 27 persons whose names

1 Supra, p. 6.

appeared on the General Council sign-in sheet for the May 13, 1997 meeting at which the 1997 Ordinance was voted on, contrary to the affiant's assertion in her second affidavit, only 13 of those persons actually attended the meeting. The Third Totenhagen Affidavit reaffirms that, as stated in the Second Totenhagen Affidavit, the vote on the 1997 Ordinance was 47 for and 0 against with the Chairman not voting. It was as a result of the potential significance of the new factual allegations in the Third Totenhagen Affidavit, its difference from the Second Totenhagen Affidavit with respect to the number of adoptees who voted, and its submission at an advanced stage of the proceedings herein, that this court gave the Plaintiffs the opportunity to respond to it in writing and orally. SMS(D)C Tr. Ct. Order, March 31, 1999.

In response, the Plaintiffs submitted no affidavits or other documents that contain specific facts that question the facts as stated by Totenhagen in her third affidavit. Instead, Plaintiff simply makes unsupported statements and innuendoes concerning the credibility of the affidavit. See Plaintiffs' Second Supplemental Brief at 18-20.

This is not enough to create a genuine issue of material fact and thus avoid summary judgment. According to one leading treatise, "The general rule is that specific facts must be produced in order to put credibility in issue so as to preclude summary judgment. Unsupported allegations that credibility is in issue will not suffice." Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2726. See also Anderson v. Liberty Lobby, 477 U.S. 242, 249-50 (1986); Moreau v. Local Union No. 247, Int. Bhd. of Fireman & Oilers, AFL-CIO, 851 F. 2d 515, 519-20 (1st Cir. 1988); Johns Hopkins Univ. v. Hutton, 297 F. Supp. 1165, 1201, aff'd in part rev'd in part on other grounds, 422 F. 2d 1124 (4th Cir. 1970). Because Plaintiffs did not supply an affidavit contradicting the Third Totenhagen Affidavit, or any other contrary evidence,

they have not properly raised the issue of Totenhagen's credibility and have not created a genuine issue of material fact with respect to the Totenhagen Affidavits. Carrol v. United Steelworkers of America, AFL-CIO-CLC, 498 F. Supp. 976, aff'd., 639 F. 2d 778 (4th Cir. 1980) (in order to raise credibility issue, party opposing summary judgment motion must produce by affidavit or otherwise sufficient evidence to show court that at trial he will be able to produce some fact to shake the credibility of the affiants); Rinieri v. Scanlon, 254 F.Supp. 469, 474 (D.N.Y. 1966) ("party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and... the opposing party may not merely recite the incantation 'credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof"). For these reasons this court finds that the facts as stated in the third Tottenhagen Affidavit are undisputed.

D. The 1997 Ordinance

1. Enactment of the Ordinance

There is no dispute of fact concerning the BIA's approval of the 1997 Ordinance. The 1997 Ordinance was adopted by a vote of 47 for and 0 against at a duly called meeting of the General Council held on May 13, 1997. Second Totenhagen Aff., ¶ 11. The Area Director received the ordinance for review on May 15, 1997 and approved it on May 23, 1997--within the constitutional ten-day limit. Letter from Acting Area Director Larry Morrin to SMS(D)C Chairman Stanley Crooks (May 23, 1997), Small Aff., Ex.8; Second Totenhagen Aff., ¶ 13. The Area Director's decision was not appealed, and although he submitted a copy of the 1997 Ordinance and related materials to the Assistant Secretary - Indian Affairs by memorandum dated May 23, 1997, "the Department took no further action on the Third Adoption Ordinance

[the 1997 Ordinance] within 90 days following the May 13 date of enactment." Memorandum from Solicitor, U.S.D.I. to Assistant Secretary - Indian Affairs (May 22, 1998), at 9. The 1997 Ordinance, therefore, is not subject to further review by the BIA.

The only question raised by Plaintiffs is whether the 1997 Ordinance was properly enacted by the General Council. This argument is based on the fact that some persons who had been adopted pursuant to the 1993 Ordinance participated in the May 13, 1997 General Council meeting at which the ordinance was enacted. This question is one for this Court alone to decide since the Assistant - Secretary has determined that it is not appropriate for the BIA to determine voter qualifications in connection with its review of an adoption ordinance. Gover Decision at 17 ("...when issues of voter eligibility are raised by tribal members in connection with tribal ordinances subject to BIA review pursuant to tribal law, the appropriate course of action is to refer those individuals to a tribal forum.").

The court holds that the 1997 Ordinance was validly enacted by the Community. The enactment of the 1997 Ordinance did not depend on the presence or the votes of persons who were adopted pursuant to the 1993 Ordinance. Even if these people were excluded from participation in the May 13, 1997 General Council meeting at which the 1997 Ordinance was enacted, a quorum still would have been present and a majority of the quorum would have voted for the ordinance. It is undisputed that the Voter Sign-in Sheet for the meeting contained the names of 113 persons. Second Totenhagen Aff., Ex 10. It is likewise undisputed that twenty-seven of these persons had been adopted pursuant to the 1993 Ordinance. Third Totenhagen aff., ¶ 5. The Totenhagen affidavits also indicate that forty-nine of the 113 people on the sign-in sheet attended the May 13 meeting, including thirteen of the twenty-seven persons adopted

pursuant to the 1993 ordinance. Second Totenhagen Aff, Ex. 10; Third Totenhagen Aff., ¶ 5. Forty-seven of these persons voted, all of whom supported the ordinance. Second Totenhagen Aff., ¶ 11; Third Totenhagen Aff., ¶ 3.

It is apparent from these numbers that a quorum was present whether or not the thirteen adoptees are counted. The Bylaws of the Community define a General Council quorum as one third of all eligible voters and permit action to be taken by a majority of the quorum. SMS(D)C By-Laws, Art. III, §§ A(4) and (5). If all forty-nine persons who attended the May 13 meeting were eligible voters, obviously a quorum was present, since one third of 113 is thirty-eight. Furthermore, since forty-seven voted for the ordinance, obviously this constituted a majority of the quorum. If all twenty-seven of the adoptees were ineligible, the total number of eligible voters on the sign-in sheet should have been eighty-six (113 minus 27), and the number of eligible voters present would have been thirty-six (49 minus 13). Since one third of eighty-six is twenty-nine, the thirty-six indisputably eligible voters constituted a quorum. We know that two of the forty-seven people present did not vote and that at least one of these (the Chairman) was eligible. Second Totenhagen Aff., Ex. 9. The other non-voter could have been either eligible or allegedly ineligible since balloting is secret. If both of the non-voters were indisputably eligible, then only thirty-four of the indisputably eligible voters could have voted for the ordinance (36 minus 2). On the other hand, if only one of the non-voters was indisputably eligible, then thirty-five of them could have voted for the ordinance (36 minus 1). Thus, the minimum number of indisputably eligible voters who voted for the ordinance was thirty-four--clearly a majority of those present.

Because a quorum of indisputably eligible voters was present and a clear majority of those present voted for the ordinance, the fact that some allegedly ineligible people voted neither deprived the meeting of a quorum nor prevented the supporters of the ordinance from attaining a majority vote. Because the participation of the allegedly ineligible voters could not have changed the outcome of the meeting , the court concludes that even if the adoptees were, in fact, ineligible, this would constitute harmless error. Therefore, the court holds that the 1997 Ordinance was validly enacted by the General Council on May 13, 1997.

2. Ratification of Prior Adoptions Under the 1993 Ordinance

This leaves the question of whether the persons adopted pursuant to the 1993 Ordinance have been members since their adoption under that ordinance or just since the adoption of the 1997 Ordinance. It is the opinion of this court that even if the 1993 Ordinance was properly disapproved by the BIA after its enactment by the General Council (and after the adoption of the individuals in question) those adoptions were subsequently ratified and reaffirmed by the enactment and BIA approval of the 1997 Ordinance.[2]

The 1997 Ordinance was enacted by means of Resolution No. 5-13-97-002, which, so far as relevant, reads as follows:

> The General Council hereby: (1) reaffirms and ratifies the action of the General Council taken on November 30, 1993 to enact Adoption Ordinance No. 11-30-93-

[2] Governments may ratify prior defective actions; provided, of course, that the government had the authority to take the action in the first place, and the defect was procedural or technical. See L.C. Eddy, Inc. v. City of Arkadelphia, 303 F. 2d 473, 476 (8th Cir. 1962); Tracy Cement Tile Co. v. City of Tracy, 176 N.W. 189, 190 (Minn. 1919); In re Matter of Certain Amendments to the Adopted and Approved Solid Waste Management Plan of Hudson Cnty. Waste Mgmt. Dist., 627 A. 2d 614, 622 (N.J. 1993); Bostrick v. City of Beaufort, 415 S.E. 2d 389, 391 (S.C. 1992).

0002 [the 1993 Ordinance] and; (2) reaffirms and ratifies all actions taken under its authority.

The Community sent both the resolution and the ordinance to the Area Director for approval.[3] The Area Director acknowledged the receipt of both documents, and approved the ordinance as enacted by... Resolution No. 5-13-97-02." Letter from Acting Area Director Larry Morrin to SMS(D)C Chairman Stanley Crooks (May 23, 1997), Small Aff., Ex. 8. For this reason, this court finds that the Area Director's approval applies both to the ordinance and to its enacting resolution.

Plaintiffs have suggested that it was somehow improper for the General Council to enact the 1997 Ordinance as a means of curing any alleged defects in the 1993 Ordinance during the pendency of their challenge to the earlier ordinance. This suggestion is based on a misunderstanding of the relative roles of the legislative, executive and judicial branches of government.

The power of the legislature to repeal or amend a law cannot be limited by the pendency of administrative or judicial challenges to the law. The legislature's power to enact, amend and repeal laws is limited only by the requirement that it act constitutionally. Amending or replacing a challenged law while a challenge is pending is certainly within the power of the legislature even when the legislative changes renders the challenge moot. See e.g., Princeton University v. Schmid, 455 U.S. 100, 103 (1982); National Advertising Co. v. City and County of Denver, 912 F. 2d 405, 412 (10th Cir. 1990); Maryland Highways Contractors Ass'n. v. Maryland, 933 F. 2d

[3] The General Council may govern adoptions by means of both ordinances and resolutions subject to review by the Secretary of the Interior. SMS(D)C Const. Art. II, § 2. Likewise the review power granted to the Secretary encompasses both adoption ordinances and adoption resolutions. SMS(D)C Const., Art. V, § 2.

1246 (4th Cir. 1991), cert. denied, 502 U.S. 939 (1991). The enactment of the 1997 Ordinance and Resolution No. 5-13-97-002 did precisely that for challenges to the 1993 Ordinance based on alleged defects in the enactment and approval of the ordinance.[4]

E. The 1993 Ordinance

In light of this court's decision regarding the 1997 Ordinance and its effects, it is arguably unnecessary to decide whether the 1993 Ordinance was properly adopted and became effective notwithstanding the Gover Decision. Plaintiffs have gone even farther--arguing that the Gover Decision, along with Solicitor Leshy's memorandum of May 22, 1998, have conclusively determined that both the 1993 and the 1997 ordinances are invalid. Plaintiffs' Supplemental Brief (Effect of February 2, 1999 Remand Decision of Department of Interior Invalidating Second Adoption Ordinance), at 3-4; Tr. of May 5, 1999 Hearing, at 18.

This court disagrees. For several reasons, it is appropriate, and even necessary, for this court to consider the validity of the 1993 Ordinance and the related adoptions. First, since the interpretation of the Community Constitution is clearly a matter of tribal law, and this court has jurisdiction to interpret the Community Constitution pursuant to Section II of the Tribal Court Ordinance, this Court, not the Assistant Secretary - Indian Affairs, is the proper forum for final interpretation of the Community Constitution. This court is not bound by the decision of the

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[4] The Solicitor for the Department of the Interior advised the Assistant Secretary - Indian Affairs that the 1997 Ordinance did not moot the consideration of the three questions remanded to Interior by the district court in Babbitt. However, it is apparent that the primary reason for this advice was the inability of the Solicitor, on the record before him, to determine whether the validity of the 1997 Ordinance turned on the validity of the 1993 Ordinance. See Memorandum from Solicitor, U.S.D.I., to Assistant Secretary - Indian Affairs (May 22, 1998), Second Totenhagen Aff., Ex. 12, at 1, 16, 18-23. The record before this court suffers from no such defect. As explained above, it is clear from the record here that the 1997 Ordinance was properly enacted.

Assistant Secretary. See Iowa Mut. Ins. Co. v. LaPlant, 480 U.S. 9, 19 (1987); Hinshaw v. Mahler, 42 F. 3d 1178, 1179 (9th Cir. 1994); Sanders v. Robinson, 864 F. 2d 630, 633 (9th Cir. 1989), cert. denied, 490 U.S. 1110 (1989). Second, if valid, the 1993 Ordinance would also determine all of the issues raised by Plaintiffs' in this case. Third, because the validity and effectiveness of the 1993 Ordinance are still at issue in Babbitt, the federal district court should have the benefit of this court's interpretation of the Community's own law on these important internal matters.

This Court believes the Assistant Secretary should not have ruled on these questions of tribal constitutional law while an action was pending in tribal court that involved the very same question. Had the Assistant Secretary waited for a short time, or even certified the questions to this court, he would have had the benefit of this court's interpretation of the ordinance review provisions of Article V, Section 2 of the Community Constitution. Given the delay that had already occurred since the federal district court remanded the matter to the Secretary in 1996, a few more weeks would seem to have been a reasonable exchange for the Community's interpretation of its own constitution with respect to these issues-- especially in light of the well-established departmental policy of giving deference to such interpretations. See Brady v. Acting Phoenix Area Director, BIA, 30 IBIA 294, 299 (1997); United Keetoowah Band v. Muskogee Area Director, BIA, 22 IBIA 75, 80 (1992). See also Iowa Mut. Ins. Co. v. LaPlant 480 U.S. 9 (1987).

The Assistant Secretary, however, decided this policy was not applicable because the interpretation offered by the attorneys for the Community "exceeds the bounds of reasonableness." Gover Decision at 7. The interpretation referred to is the one offered on behalf

of the Community by its attorneys. It seems to this court that it, not Community's attorneys, is the proper source for a final, official interpretation of the Community Constitution. Because of the Assistant Secretary's refusal to wait on this court's imminent ruling on the 90-day review issue, this court was deprived of having any impact on the Assistant Secretary's decision on the tribal law question of whether a key Community ordinance had been properly adopted and approved in the manner required by the Community Constitution. By acting as he did, the Assistant Secretary, in effect, decided that no interpretation this Court might offer could possibly be "reasonable" if it disagreed with his views. The policy of deference to tribal courts' interpretations of their own laws surely requires that the Assistant Secretary at least give this court the opportunity to express its views on these issues before deciding they are unreasonable.

Therefore, this court believes it is essential, not only to provide an alternative holding in support of its decision herein, but also to offer the BIA and the federal courts a statement of its views on the constitutional issues surrounding the passage and review of that ordinance. These issues involve the two phases of the ordinance approval process as established by the Community Constitution: (1) approval by the Community and (2) review by the BIA.

1. Adoption of the 1993 Ordinance by the Community

Defendant argues that the General Council validly passed the 1993 Ordinance at the November 30, 1993 General Council meeting. In order to pass a valid Community ordinance, among other things, a quorum of the Community General Council must be present and a majority must vote to approve the ordinance. See SMS(D)C By-Laws, Art. III, Sec. A(4) and Art. V, Sec. 2.

To support their arguments that a quorum was present and a majority voted for the 1993 ordinance, Defendants have provided an affidavit from Susan Totenhagen, the current Secretary

of the Community, who is the person responsible for maintaining the Community's records. See Second Totenhagen Aff. Totenhagen's affidavit describes the numerous attached exhibits and attests to the fact that the Community records show that on November 30, 1993, a quorum of the Community's enrolled membership was present and a majority voted to adopt the 1993 ordinance. Id.

Plaintiffs counter that a quorum was not present because people who were not qualified to vote were permitted to vote. There is nothing in the record that this court could find, nor to which the court has been directed, to support Plaintiffs' contentions. First, in order to vote at General Council meetings a person need only be a properly enrolled member of the Community. SMS(D)C Const., Arts. II and. IV. What is confusing about some of Plaintiffs' arguments is that they repeatedly assume the very point they are trying to prove, namely that people adopted under Article II, Section 2 are not constitutionally qualified to vote. That is simply not the state of Community law. This court has concluded that people may be adopted under Article 2, Section 2, even if they would not qualify under another section of the Community's Constitution. Smith et al. v. SMS(D)C, No. 11-96 (SMS(D)C Ct. App. Aug. 7, 1997). Therefore, whether an enrolled member of the Community is constitutionally qualified is for the Enrollment Committee to determine, not for the Plaintiffs. See Enrollment Ordinance 12-28-94-005.

In addition, in their pleadings before the Department of Interior on remand, Plaintiffs allege that members of the Welch family were allowed to vote in the November 30, 1993 election, but were not members of the Community. See Plaintiffs' Opening Brief on Judicial Remand, July 31, 1998, at 16. This allegation, however, is in error because all of the Welches were enrolled in the Community by the time of the November 30, 1993 meeting. See Brief of SMS(D)C, July 31, 1998, Ex. 14, at 3; Welch v. SMS(D)C, No. 022-92 (SMS(D)C Tr. Ct. June

3, 1993). Indeed, at least one of the documents Plaintiffs requested that the Court include in the record specifically notes that the Welches were enrolled at the time of the November 30, 1993 General Council meeting. See BIA Brief on Five Issues, Dec. 4, 1998, at 5, n.6.

The Plaintiffs also presented arguments to the Department of Interior regarding the ability of members to vote in Secretarial elections. For the purpose of this Court's interpretation of Community law, the ability of the Welches, or others, to vote in Secretarial elections is not relevant to a member's qualification to vote in a General Council election. Eligibility to vote on General Council ordinances is determined by the Community under the terms of its Constitution and Enrollment Ordinance. See SMS(D)C Const., Arts. III, IV, V(i)-(h); Enrollment Ordinance No. 6-08-93-001. See also Smith et al. v. SMS(D)C Business Council et al., No. 038-94 (SMS(D)C Tr. Ct. July 8, 1994), aff'd, SMS(D)C Business Council et al. v. Smith et al., No. 001-94 (SMS(D)C Ct. App. June 19, 1995) ("One of an Indian Tribe's most basic powers is the authority to determine questions of its own membership," and "[a] tribe has power to grant, deny, revoke, and qualify membership.") There is no indication in the Community's Constitution or Enrollment Ordinance that eligibility to vote in Secretarial elections under 25 C.F.R. Part 81 is requirement for Community membership.

In sum, despite four years and active participation in three related lawsuits, Plaintiffs have failed to demonstrate any genuine issue of fact concerning whether the people constituting a quorum or voting at the November 30, 1993 General Council meeting were duly enrolled members of the Community. The Gover Decision does not address this issue. Therefore, this court holds that as a matter of law the 1993 Ordinance was properly adopted by the Community's General Council on November 30, 1993.

1. Review of the 1993 Ordinance by the Secretary

a. The Ninety-Day Review Provision

Article V, Section 2 of the Community Constitution establishes the process for referring legislation to the Secretary for approval. It reads as follows:

> Any resolution or ordinance which, by terms of this constitution, is subject to review by the Secretary of the Interior shall be presented to the Area Director of this jurisdiction who shall, with[in] ten (10) days thereafter, approve or disapprove the same. If the Area Director shall approve any ordinance or resolution, it shall thereupon become effective, but the Area Director shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may, within ninety (90) days from the date of its enactment, rescind the action of the Area Director for any cause by notifying the council of such decision.
>
> If the Area Director shall refuse to approve any resolution or ordinance submitted to him within ten (10) days of its enactment, he shall advise the council of his reasons therefore. If these reasons appear to the council insufficient, it may, by majority vote, refer the ordinance [or] resolution to the Secretary of the Interior, who may, within ninety (90) days from the date of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective.
>
> If the Area Director shall take no action to approve or disapprove any resolutions or ordinance within thirty (30) days of its being presented to the Area Director, the community shall consider the resolution or ordinance approved and notify the Area Director of the same.

(Emphasis added).

Defendants argue alternatively that either (1) the Assistant Secretary's characterization of the constitutional ninety-day secretarial review period as "jurisdictional" is incorrect or (2), if the ninety-day period is jurisdictional, so is the ten-day window for review by the Area Director

The obvious purpose of the ninety-day review period is to protect the Community against abuse of the Area Director's ordinance and resolution review power. The drafters of the Community Constitution granted this power sparingly. The Constitution provides for such

review and approval in just two situations—resolutions and ordinances "governing future membership, adoptions and loss of membership" and ordinances "directly affecting non-members." MS(D)C Const., Art. II, Sec. 2 and Art. V, Sec. 1, cl. (h). Apparently, the drafters felt the need for some sort of oversight of the power of the Community Council in these areas, but they also recognized that the power to disapprove resolutions and ordinances is a significant limitation on the sovereign rights of the Community, which power could, itself, be abused. For that reason they imposed several limitations on the review power, among them the requirement that the Area Director "approve or disapprove an ordinance or resolution" within ten days and the right of the Community Council to appeal the disapproval of an ordinance or resolution to the Secretary.

The right to appeal to the Secretary was clearly intended to be an important protection for the Community's rights of self-determination. Unfortunately, the Gover Decision defeats the intent on the Constitution by interpreting the ninety-day period as jurisdictional; i.e., as establishing an absolute deadline for secretarial action that, as a practical matter cannot be met unless the Assistant Secretary exercises his discretionary power to take such appeals out of the hands of the IBIA. It cannot be met because the normal BIA appeal process established by 25 C.F.R. Part 2 cannot be completed in ninety days. See Gover Decision at 9-11. The notion that because it is theoretically possible for the Assistant Secretary to bypass the IBIA and issue a decision on an appeal within ninety days, there is no inconsistency between the Assistant Secretary's interpretation of the ninety-day provision and BIA rules (which, in this respect, remain essentially the same as they were when Article V of the Community Constitution was adopted in 1980) ignores the undeniable fact that in practice such an inconsistency exists.

If the Assistant Secretary means to suggest that the mere theoretical possibility of completing BIA review within ninety days is justification for adopting a narrowly literal interpretation of Article V, Section 2 that renders the Community's appeal right practically worthless, this court must respectfully disagree. If, however, the Assistant Secretary is implying that he will, as a matter of course, exercise his authority under 25 C.F.R. § 2.20(b) to determine all Shakopee ordinance appeals within the ninety days allowed by the Community Constitution, his interpretation is reasonable. It is reasonable because it not only preserves a real right of appeal for the Community, but it also insures that appeals will be promptly determined. Both of these outcomes are consistent with the obvious intent of Article V, Section 2 of the Community Constitution because they protect the sovereign, governmental rights of the Community to make its own laws subject only to reasonable oversight in limited circumstances.

It is possible, therefore, that, with the cooperation of the Assistant Secretary, his literal interpretation of the ninety-day review period could yield a reasonable outcome. However, at this time it is not possible for this court to determine whether this approach was intended or is acceptable to the Assistant Secretary. Until this issue is clarified between the Community and the Assistant Secretary, it would be premature for this court to issue its own interpretation of the ninety-day provision unless it were necessary to resolve the issues before it in this case—specifically the validity of the 1993 Ordinance. For the reasons discussed below, the validity of the 1993 Ordinance can be determined without reference to the ninety-day provision.

b. The Ten-day Review Provision

If the Gover Decision is wrong about the ninety-day provision, then the IBIA approval of the Ordinance should stand. On the other hand, if the 90-day period for Secretarial review is

jurisdictional for the reasons given in the Gover Decision, the 10-day period for initial action by the Area Director surely must likewise be jurisdictional. Since the Area Director's disapproval of the 1993 Ordinance occurred more than 10 days after its enactment, the disapproval was ineffective. In other words, the failure of the IBIA to act within 90 days of the date of enactment may invalidate the IBIA reversal of the Area Director's disapproval of the ordinance, but the failure of the Area Director to disapprove the ordinance within 10 days of enactment in turn invalidates his disapproval. Since the Area Director's action was void, it must be treated the same as a failure to act. Under Article V, Section 2 of the Community Constitution, if the Area Director fails to approve or disapprove an ordinance within 10 days, it becomes effective by operation of law 30 days after enactment. Obviously, if the 1993 Ordinance was valid, the persons adopted pursuant to it have been Community members since that time and, as such, were entitled to the full benefits of membership during the period between the enactment of the 1993 and 1997 ordinances—regardless of the effectiveness of the ratification of those adoptions by the resolution that approved the 1997 Ordinance.

The Assistant Secretary did not directly consider or rule on the effect of the 10-day requirement for BIA Area Director action contained in Article V, Section 2 of the Community Constitution, although in a footnote it appears he assumed that the Area Director actually had 30 days in which to approve or disapprove an ordinance. Gover Decision at 8, n. 9. That assumption was incorrect.

This assumption was incorrect because it failed to heed the basic canon of statutory construction that requires all portions of a statute to be given effect. Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 239 (1985), quoting Colautti v.

Franklin, 439 U.S. 379, 392 (1979. See also Turner v. Bd. of Trustees, 126 Cal. Rptr. 443 (Cal. App. 1976); Martin v. Dept. of Soc. Security, 121 P. 2d 394 (Wash. 1942); FAA Administrator v. Robertson 422 U.S. 255, 261 (1975); Weinberger v. Hynson, Wescott & Dunning, 412 U.S. 609, 633 (1973); Welsh v. SMS(D)C, No. 023-92 (SMS(D)C Tr. Ct. Dec. 23, 1994), at 5; Stade v. SMS(D)C, No. 002-88 , (SMS(D)C Tr. Ct. Apr. 13, 1988); Hopi Indian Tribe v. Commissioner of Indian Affairs, 4 IBIA 134, 82 I.D. 452 (1975). In particular, the Gover Decision effectively nullified the requirement of Article V, Section 2 that the Area Director "approve or disapprove" an ordinance submitted to him for review within ten days.

The general outline of Article V, Section 2 of the Community Constitution is reasonably clear.[5] It covers all of the possible responses of the Area Director-- approval, disapproval and failure to act. The Area Director is required in mandatory terms to approve or disapprove an ordinance within ten days of receipt[6]. If he approves the ordinance, it becomes immediately effective, subject to the Secretary's right to rescind within ninety days from enactment. If the area Director disapproves the ordinance within the ten-day period, he must advise the council of his reasons therefore, and the General Council then may invoke the ninety-day review by the Secretary. Finally, if in spite of the requirement to approve or disapprove an ordinance within ten

5 Supra, p.22-23.

6 Article V. Section 2 is ambiguous as to the date from which the ten days runs. The first paragraph of Section 2 requires the Area Director to "approve or disapprove" an ordinance "with[in] ten (10) days thereafter," the "thereafter" referring to the date the ordinance was "presented to the Area Director" (which this court interprets as meaning the date the ordinance was received by the Area Director). On the other hand, the second paragraph requires the Area Director to "advise the council of his reasons" for refusing to approve an ordinance within ten days of "enactment." While it might be possible to interpret the two ten day periods as different (one determining when the Area Director is required to "advise the council of his reasons" for not approving the ordinance, and the other determining absolute deadline for Area Director action, it does not seem likely that the drafters of the Constitution intended this difference. Given the specific requirement that the Area Director approve or disapprove an ordinance within ten days of presentation, and the subsequent reference in paragraph 3 of the section to the ordinance becoming effective thirty days after it was "presented to the Area Director," this court construes the ten day approval period to run from presentation of the ordinance.

days of receipt, the Area Director fails to act, the ordinance takes effect thirty days after receipt by the Area Director and is not subject to the ninety-day review by the Secretary.

The provision specifically requires that the Area Director "shall approve or disapprove" an ordinance within ten days. The court interprets this to be a mandatory requirement. Generally, as used in constitutions and statutes the word "shall" is considered to be imperative or mandatory, and is only considered to be permissive if that meaning is evident from the context of the statute or constitution or it is the clear intent of the drafters. Scanlon v. City of Menasha, 114 N.W. 2d 791, 795 (Wis. 1962). See also Kaplan v. Tabb Associates, Inc., 657 N.E. 2d 1065, 1067 (Ill. App. 1995); People v. Municipal Ct. of Los Angeles Judicial Dist., 197 Cal. Rptr. 204, 206 (Cal. App. 1984); Johnson v. Dist. Atty. for Northern Dist., 172 N.E. 2d 703, 705 (Mass. 1961). This is especially true where "public policy is in favor of this meaning, or when addressed to public officials, or where a public intent is involved, or where the public…have rights which ought to be exercised or enforced…." Black's Law Dictionary 1375 (6th Ed. 1990), citing People v. O'Rourke, 13 P. 2d 989 992 (Cal. App. 1932). See also State ex rel. Trent v. Sims, 77 S.E. 2d 122, 136 (W. Va. 1953) ("shall" to be read as mandatory especially where the provision concerns public policy).

As explained above, there is a clear public policy purpose served by construing the ten-day provision as mandatory and hence jurisdictional. That purpose is to provide for the outside review of Community ordinances and resolutions in two key situations but to protect the Community's self-government rights by limiting the review process, particularly by requiring decisions to be made within specific time periods and by subjecting the Area Director's actions to review by the Assistant Secretary.

To interpret the reference to "approve or disapprove" in the phrase "If the Area Director takes no action to approve or disapprove any... ordinance within thirty (30) days" of receipt to be

a positive grant of an additional twenty days of review time to the Area Director, as suggested by the Gover Decision, is not reasonable. This interpretation would render the plain, express requirement that he "approve or disapprove" within ten days essentially meaningless. Under the Assistant Secretary's interpretation that the ninety day window for Secretarial review is jurisdictional, reducing the actual time available to obtain a secretarial decision by up to thirty days would make it practically impossible for the Community to challenge an Area Director's disapproval of an ordinance – even if the Assistant Secretary invoked his authority to decide the appeal pursuant to 25 C.F.R. §2.20(b).

Consider this hypothetical situation. The council enacts an ordinance on day one and immediately submits it to the Area Director for review who receives it on day two. The Area Director takes no action until day thirty-one (twenty-nine days after receipt) at which time he disapproves the ordinance and immediately returns it by mail to the Community which convenes a council which, on day thirty-four votes to refer the ordinance to the Secretary for review and immediately overnights the referral to the Secretary who receives it on day thirty-five. According to the Gover decision, the Secretary would have just sixty-five days-- just over two months-- to review the Area Director's disapproval because the ninety days runs from the date of enactment, not the date the Secretary receives the referral. Obviously, the chances of this occurring would be essentially zero.

The drafters of the Community Constitution cannot have intended such a result. Obviously, it is in the interest of the Community to give the Secretary as much of the ninety days as possible to review the Area Director's decision. The ten-day window for approval or disapproval of an ordinance by the Area Director must have been intended expedite the review

process and to leave reasonable time for an appeal to the Secretary, if necessary. Allowing the Area Director to exceed the ten-day deadline is inconsistent with this objective. For this reason the Court interprets the ten-day window for approval or disapproval by the Area Director as jurisdictional. The Area Director, therefore, may approve or disapprove an ordinance only within ten days of receipt. If the Area Director fails to act within the ten-day period, the ordinance becomes effective by the operation of law on the thirty-first day after receipt.

This interpretation is not only consistent with the Gover decision on the ninety-day period and with the apparent intent of the framers of the Community Constitution, it also appears to be consistent with the position taken by the former Assistant Secretary - Indian Affairs in her May 23, 1995 letter to Mr. Cohen in which she concluded that because the Area Director disapproved the 1993 Ordinance more than ten days after it was presented to him by the Community, it "was not properly before" him, i.e., he had no jurisdiction to act. Small Aff., Ex. 6. See also Letter from Acting Area Director Larry Morrin to Stanley R. Crooks (May 23, 1997), Small Aff. Ex. 8 ("The constitution requires approval or disapproval [of the 1997 Ordinance] by this office within ten (10) days."); Letter from Ada E. Deer, Assistant Secretary – Indian Affairs to Stanley R. Crooks, Chairman, Shakopee Mdewakanton Sioux Community (May 17, 1995), Plaintiff's Second Supplemental Brief, Ex. 1.

This interpretation is also consistent with the 1941 opinion of the Solicitor for the Department of the Interior that Assistant Secretary Deer relied on in her May 23, 1995 letter. That opinion, dealt with a provision of the Walker River Paiute Constitution of 1937 that contained a ten-day review provision similar to the provision at issue here. In that opinion the

Solicitor concluded that the BIA had no authority to act on an ordinance after the period had expired. 1 Op. Sol. 950.

Here, as recognized by Assistant Secretary Deer, the Area Director's disapproval of the 1993 Ordinance occurred more than ten calendar days after enactment of the ordinance. The 1993 Ordinance was enacted on November 30, 1993, and it was submitted to the Area Director on December 2. See Plaintiffs' Second Supplemental Brief at 7 ("the adoption ordinance was voted on with 24-hour balloting on November 30 and December 1, 1993, and forwarded to the Area Director on December 2, 1993."). The Area Director disapproved it on December 13, 1993--eleven days after it was presented. Letter from Acting Area Director to Chairman, SMC (D) (December 13, 1993), Small Aff., Ex. 1; Plaintiffs' Second Supplemental Brief at 7.

As the Plaintiffs point out, however, the tenth day (December 12, 1993) was a Sunday. This begs the question whether the Constitution refers to calendar days or business days. This issue was discussed specifically at the General Council Meeting of November 30, 1993, just prior to the vote on the 1993 Ordinance. Some members of the Council were concerned about how long the Area Director had under the Constitution to approve or disapprove the ordinance. The discussion was as follows:

> Cynthia Picket: Do you think it is going to happen within 12 days and then you are looking at less than 12 days because you have weekends, so 8 days we are looking at this, actually 7 days?
>
> Darlene Matta: We can call a meeting with 48 hours notice. It depends on how fast all of you parents can fill out your enrollment papers for your children.
>
> Glynn Crooks: But the fact still remains though, Darlene, she is not talking about that. She is talking about so we approve this [the 1993 Ordinance] tonight, it sits on the Bureau's desk for how long?
>
> Darlene Matta: They have ten days.
>
> Stanley Crooks: Ten days.
>
> Glynn Crooks: But yet we are told we can't take that chance because we have to assume that we are not going to get it.
>
> Cynthia Picket: Ten business days or ten days period?
>
> Stanley Crooks: Ten days.

Glynn Crooks: You don't know the Bureau—so they wait the ten days.

Minutes of General Council Meeting, November 30, 1993, Second Totenhagen Aff., Ex. 7, at 21-22.

Obviously, the General Council assumed ten days meant ten calendar days. The BIA initially adopted the same interpretation. It asserted in the Feezor remand proceedings:

> The Department interprets the ten days literally, not as business days , which is consistent with the Community's interpretation. Thus, the Area Director could not have approved the ordinance on the Monday, had he chosen to do so.

Brief of the Bureau of Indian Affairs on the Merits, In Re: The Remand of the Shakopee Mdewakanton Sioux Second Adoption Ordinance: *Feezor v. Babbitt*, U.S.D.I., Office of the Assistant Secretary – Indian Affairs, Second Hogan-Kind Aff., Ex. 2, at 5 n. 8. This is consistent with the reasoning of the Assistant Secretary – Indian Affairs in the May 23, 1995, letter to James H. Cohen, which, as noted above, concluded that the 1993 Ordinance "was not properly before the Area Director on December 13, 1993."

Admittedly, this is a strict and literal construction of the constitutional language, but so is the Assistant Secretary's construction of the 90-day secretarial appeal period. In fact, contrary to the Assistant Secretary's interpretation of the 90-day period, interpreting the ten-day period as ten calendar days recognizes and protects the Community's interests by strictly limiting the Area Director's review powers, which obviously are in derogation of the Community's sovereign, governmental rights. By keeping the review period as short as possible, the Area Director will, for all practical purposes, be limited to dealing with serious defects that appear on the legislative record and that affect the federal government's trust responsibility, rather than substituting his judgment for that of the General Council. That makes sense since it appears that the review provisions of Article V, Section 2 must have been intended to protect against illegal action by the

General Council rather than against "unwise" political decisions. Furthermore, a strict interpretation of the ten-day period make sense regardless of how the 90-day period is interpreted

Therefore, the Area Director's disapproval on the eleventh day after receipt was entirely without effect and was functionally and legally equivalent to failure to approve or disapprove within ten days. Unlike many other tribal constitutions, failure to act does not result in *de facto* disapproval. This is because, as explained above, Article V, Section 2, expressly provides for approval by operation of law in the event that the Area Director does not act within the ten-day period. Other tribal constitutions, including the Walker River Paiute Constitution at issue in 1 Op. Sol. 950 (I.S.D.I. 1979), require Bureau approval as a precondition to the validity of an ordinance. Consequently, the 1993 Ordinance became effective by operation of law on January 1, 1994 (thirty days after presentation to the Area Director on December 2).

IV. CONCLUSION

This Court would like to be clear that it has held in the past that the General Council's historical practice of "voting in" or adopting new members by ordinance under Art. II, Sec. 2, without requiring that those persons demonstrate that they possess one-fourth Mdewakanton Sioux blood, is a reasonable and permissible interpretation of the Community's Constitution. Smith et al. v. SMS(D)C, No. 11-96 (SMS(D)C Ct. App. Aug. 7, 1997). Consistent with this precedent, this Court holds today that the 1997 Ordinance and its adopting resolution are effective as a matter of Community law. People who are or were properly adopted into the Community pursuant to the terms of the 1997 Ordinance, and pursuant to other properly executed adoption procedures, are entitled to the full benefit of Community membership. In addition, the resolution that adopted the 1997 Ordinance effectively ratified and confirmed all adoptions under the 1993 Ordinance.

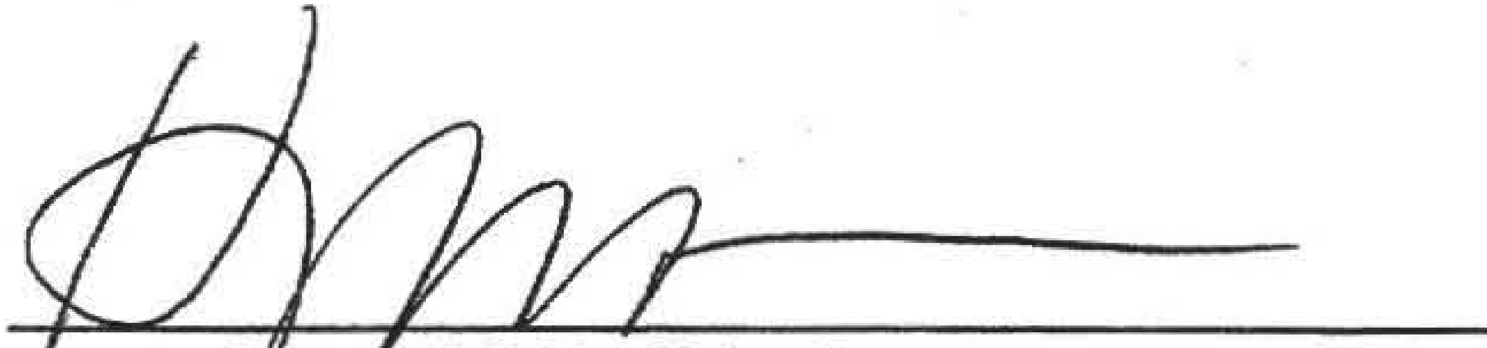
In the alternative this court holds that the 1993 Ordinance was validly adopted by the General Council and became effective by operation of law after the Area Director failed to disapprove the ordinance ten days after having received it for review. Having ruled on Defendants' counterclaims in Defendant's favor, there is no longer a basis to grant the relief requested in Plaintiffs' Amended Complaint.

ORDER

Based on a review of the submissions herein, and for the foregoing reasons,

Defendant's Motion for Summary Judgment is GRANTED and Plaintiff's Complaint is DISMISSED with prejudice.

Dated: 5/19/99



Henry M. Buffalo, Jr.
Judge